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7 Attorneys for Palm Terrace Claimants

8 UNITED STATES BANKRUPTCY COURT
9 DISTRICT OF NEVADA

11 In re:

12 USA COMMERCIAL MORTGAGE
13 COMPANY,14 USA CAPITAL REALTY ADVISORS,
15 LLC,16 USA CAPITAL DIVERSIFIED TRUST
17 DEED FUND, LLC,18 USA CAPITAL FIRST TRUST DEED
19 FUND, LLC,

20 USA SECURITIES, LLC,

Debtors.

Case No. BK-S-06-10725-LBR

Case No. BK-S-06-10726-LBR

Case No. BK-S-06-10727-LBR

Case No. BK-S-06-10728-LBR

Case No. BK-S-06-10729-LBR

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725-LBR

**RESPONSE TO FIRST OMNIBUS
OBJECTION OF USACM TRUST TO
PROOFS OF CLAIM BASED ON PALM
TERRACE LITIGATION**

Date: February 20, 2009

Time: 9:30 a.m.

Courtroom 1

Honorable Linda B. Riegler

Affects:

All Debtors

X USA Commercial Mortgage Company

USA Capital Realty Advisors, LLC

USA Capital Diversified Trust Deed Fund, LLC

USA Capital First Deed Fund, LLC

USA Securities, LLC

27
28 The Palm Terrace Claimants (as defined in the First Omnibus Objection of USACM Trust

1 to Proofs of Claim Based Upon Palm Terrace Litigation) hereby respond to the USACM
 2 Liquidating Trust's First Omnibus Objection of USACM Trust to Proofs of Claim Based Upon
 3 Palm Terrace Litigation as follows:

4 MEMORANDUM OF POINTS AND AUTHORITIES

5 I. BACKGROUND

6 1. On or about February 1, 2006, sixteen investors (the "Palm Terrace Plaintiffs") in an
 7 apartment complex known as the Palm Terrace Apartments in Las Vegas, Nevada filed an action
 8 in the Santa Clara County Superior Court (the "Palm Terrace Litigation") against the seller of the
 9 apartments and several other individuals and businesses involved in the sale. The Palm Terrace
 10 Plaintiffs' Complaint alleged causes of action for fraud, negligent misrepresentation, breach of
 11 fiduciary duty, unfair competition, false advertising, negligence, conspiracy, and aiding and
 12 abetting. At the heart of the Palm Terrace Plaintiffs' causes of action was the allegation that they
 13 and their lender, LaSalle Bank, had been provided false information, in the form of rent rolls for
 14 the apartments, regarding the apartment complex's financial situation.

15 2. Among the defendants in the Palm Terrace Litigation were USA Commercial Mortgage
 16 Company ("USACM") and Andrew Hantges ("Hantges"), who held himself out as a Vice
 17 President of USACM. (See the Declaration of Jonathan A. McMahon filed concurrently herewith
 18 (the "McMahon Decl.") at ¶ 11). Hantges represented the Palm Terrace Plaintiffs as their
 19 mortgage broker in the transaction to purchase the apartment complex. (See McMahon Decl. ¶ 5).
 20 In his haste to close the deal, Hantges submitted false information in the form of rent rolls and
 21 other financial documents, which he signed, to the Palm Terrace Plaintiff's lender. (See
 22 McMahon Decl. ¶¶ 7-10). This false information, which overstated the amount of rental income
 23 the apartments would generate, allowed the Palm Terrace Plaintiffs to obtain their loans and close
 24 escrow on the complex.

25 3. On November 6, 2006, the Palm Terrace Claimants (as defined in the First Omnibus
 26 Objection of USACM Trust to Proofs of Claim Based Upon Palm Terrace Litigation) filed their
 27 claims against USACM, alleging that their liability, if any, in the Palm Terrace Litigation arose
 28 due to the actions of Andrew Hantges, acting on behalf of USACM as the mortgage broker for the

1 Palm Terrace Plaintiffs.

2 4. In or around November 2008, the parties to the Palm Terrace Litigation, with the
3 exception of USACM, entered into a confidential settlement agreement and the Palm Terrace
4 Litigation was dismissed.

5 5. At least a portion of the confidential settlement was funded by one or more of the Palm
6 Terrace Claimants' insurance carriers. The Palm Terrace Claimants, however, did incur
7 \$184,965.74 in legal fees arising out of the Palm Terrace Litigation that was not funded by any
8 insurance carrier. (See McMahon Decl. ¶¶ 2, 3).

9 6. On January 16, 2009 the USACM Trust filed its Notice of Hearing and First, Second,
10 Third, and Fourth Omnibus Objections USACM Trust to Proofs of Claim Based Upon Palm
11 Terrace Litigation.

12 7. The USACM Trust's Notice of Hearing states that, pursuant to Local Rule 2007(b),
13 this response must be filed by February 13, 2009.

14 II. RESPONSE TO OBJECTIONS

15 a. Claims Are Not Duplicative.

16 8. At the time the Palm Terrace Claimants filed their individual proofs of claim, the Palm
17 Terrace Litigation was ongoing and the Palm Terrace Claimants could only estimate each of their
18 individual liability arising out of the litigation. Thus, each Palm Terrace Claimant filed an
19 individual claim.

20 9. As a result of the confidential settlement of the Palm Terrace Litigation, the Palm
21 Terrace Claimants now know the amount of their liability arising out of the litigation. Of the
22 settlement funds, costs, and attorney's fees incurred in defending the Palm Terrace Litigation,
23 \$184,965.74 were not paid by any insurance carrier. Palm Terrace Claimant WOW Enterprises,
24 Inc. (Claim # 10725-00918) incurred \$184,965.74 in legal fees arising out of the joint defense of
25 the Palm Terrace Litigation and the remaining Palm Terrace Claimants have assigned their claims
26 in these proceedings to claimant WOW Enterprises, Inc. (See McMahon Decl. ¶¶ 2, 3).

27 10. USACM Trust is correct in that the claims originally filed by the Palm Terrace
28 Claimants do not accurately state the amount of their claims as of this date. WOW Enterprises,

1 Inc.'s claim (Claim # 10725-00918), however, remains valid in the amount of \$184,965.74. (See
2 McMahon Decl. ¶¶ 2, 3).

3 **b. The Palm Terrace Claimants Have Standing.**

4 11. At least a portion of the confidential settlement of the Palm Terrace Litigation was
5 funded by one or more of the Palm Terrace Claimants' insurance carriers. The Palm Terrace
6 Claimants, however, did incur \$184,965.74 in legal fees arising out of the Palm Terrace Litigation
7 that was not funded by any insurance carrier. This amount has been charged to Claimant WOW
8 Enterprises, Inc. (Claim # 10725-00918) and the remaining Palm Terrace Claimants have
9 assigned their claims in these proceedings to WOW Enterprises, Inc. (See McMahon Decl. ¶¶ 2,
10 3).

11 12. The Palm Terrace Claimants, therefore, have been damaged in the amount of
12 \$184,965.14 and consequently have standing to bring their actions against USACM.

13 **c. The Palm Terrace Claimants Do Not Come With Unclean Hands**

14 13. A proof of claim is presumed valid under Bankruptcy Rule 3001(f). "[A] proof of
15 claim is prima facie evidence of the validity of the claim. Although the creditor bears the
16 ultimate burden of persuasion, the debtor must come forward with evidence to rebut the
17 presumption of validity." *In re Southern Calif. Plastics, Inc.* 165 F.3d 1243, 1248 (9th Cir.
18 1999) (emphasis added). In its First Omnibus Objection, the USCAM Trust has offered no
19 evidence that any of the Palm Terrace Claimants were complicit in, or had knowledge of, the
20 fraud perpetrated by Hantges on the Palm Terrace Plaintiffs. The USCAM Trust, therefore, has
21 not presented sufficient evidence to rebut the presumption of validity of the Palm Terrace
22 Claimants' claims.

23 14. Evidence discovered during the Palm Terrace Litigation shows that Hantges filled out
24 and signed falsified Multifamily Rent Rolls, Income and Expense Statements, and Collateral
25 Information Questionnaires. (See McMahon Decl. ¶¶ 7-10). These were forms provided to
26 Hantges by the Palm Terrace Plaintiffs' lender, LaSalle Bank, and submitted by Hantges to the
27 lender in order to secure the loans to purchase the apartments. (*Id.*) Any fraud that was
28 committed during the transaction to purchase the Palm Terrace Apartments was perpetrated by

1 Hantges, acting in his capacity as a mortgage broker for USACM. The Palm Terrace Claimants
 2 do not come with unclean hands. The Palm Terrace Claimants, therefore, are entitled to
 3 indemnification and contribution from USACM in the amount of \$184,965.74.

4 **d. The Doctrine of Respondeat Superior Applies**

5 15. At all times during the transaction to purchase the Palm Terrace Apartments, Hantges
 6 held himself out to be acting on behalf of USACM. Evidence obtained during discovery in the
 7 Palm Terrace Litigation shows that Hantges sent emails to the various parties from the email
 8 address ahantges@usacapitalcorp.com. (See McMahon Decl. ¶ 8). The signature block on
 9 Hantges' emails identified him as "Andrew Hantges, CCIM, USA Commercial Mortgage." (Id.)
 10 Hantges also sent the Palm Terrace Plaintiffs Letters of Interest on USA Commercial Mortgage
 11 letterhead which identified him as "Vice President, USA Commercial Mortgage." (See McMahon
 12 Decl. ¶ 11) No argument can be made that Hantges was not acting within the course and scope of
 13 his duties at USACM.

14 16. Furthermore, Debtor has provided no evidence that Hantges was not acting in the
 15 scope and course of his employment with USACM. A proof of claim is presumed valid and, in
 16 an objection, the debtor must come forward with evidence to rebut the presumption of validity.
 17 *In re Southern Calif. Plastics, Inc.* 165 F.3d 1243, 1248 (9th Cir. 1999). USACM has not
 18 presented any evidence that the doctrine of respondeat superior does not apply.

19 **e. The Palm Terrace Claimants Did Not Fail to Mitigate Their Damages.**

20 17. See Paragraphs 8 through 10 above.

21 18. In addition, the USACM Trust has provided no evidence that the Palm Terrace
 22 Claimants failed to mitigate their damages, despite its obligation to do so. See *In re Southern*
 23 *Calif. Plastics, Inc.* 165 F.3d 1243, 1248 (9th Cir. 1999)

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1 **III. CONCLUSION**

2 For the forgoing reasons, the Palm Terrace Claimants respectfully ask the Court to
3 overrule the USACM Trust's objections to the claims arising out of the Palm Terrace Litigation
4 and allow such claims in the amount of \$184,965.74.

5 /

6 Dated: February 11, 2009

TINGLEY PIONTKOWSKI LLP

7
8 By: 

JONATHAN A. MCMAHON

Attorneys for Palm Terrace Claimants